

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>RICHARD JONES</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 202,657
<b>CARRIER CORPORATION</b>	)	
Respondent	)	
AND	)	
	)	
<b>CIGNA</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals from a preliminary hearing order entered by Administrative Law Judge Robert H. Foerschler on August 30, 2000.

**ISSUES**

This appeal involves a post-award application for medical treatment. Claimant asks that respondent be ordered to authorize surgery for a low back injury. The ALJ denied the request. Claimant asks that the ALJ's decision be reversed and also asks for an award of attorney fees pursuant to K.S.A. 44-536(g).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board concludes the Order denying further medical treatment should be reversed. The request for attorney fees is denied at this time as it remains possible that claimant will recover temporary total disability or permanent partial disability benefits from which attorney fees would be taken.

Claimant injured his back on September 22, 1993, while working for respondent. Claimant filed a workers compensation claim for that injury and, in an appeal to this Board, the Board found claimant sustained a 15 percent permanent disability based on functional impairment. The Board reversed the decision by the ALJ to deny future medical treatment. The Board concluded:

[B]oth Dr. Healy and Dr. Koprivica testified it was reasonable to expect claimant to require medical treatment in the future for his low-back injury. Therefore, the Appeals Board concludes future medical treatment should be ordered upon proper application to and approval by the Director.

In May 1994, claimant left employment with respondent and began working for U.S. Engineering Company. At U.S. Engineering, claimant worked within the restrictions recommended by the authorized treating physician, Dr. Brian E. Healy. Claimant testified that his low back symptoms remained the same and he has not had any new injury or accident. According to claimant, he simply reached the point that he no longer wanted to tolerate the pain. He asked to go back to see Dr. Healy, his authorized treating physician. Dr. Healy had recommended surgery in 1997, but claimant chose not to have surgery at that time.

Claimant saw Dr. Healy on July 29, 1999, and Dr. Healy's report of that date mentions that claimant has been reluctant to undergo surgery and then indicates surgery may be necessary to provide satisfactory relief. The report also attributes the need for surgery to the September 1993 injury that occurred while working for respondent:

He continues to work and has not missed a great deal of work, and I do not feel in the absence of any progression of his slip or any further evidence of instability, particularly at a different level, that his work has been responsible for anything that has happened of a different nature since September 22, 1993. This is a long way of saying that I do believe the problems that he is experiencing at this point date back to September 22, 1993 and are not necessarily caused by subsequent events. However, the activity he is being asked to perform will continue to irritate this underlying condition in the absence of more definitive treatment.

Respondent then sent claimant to Dr. P. Brent Koprivica for an opinion on the need for surgery and the cause of current problems. Dr. Koprivica had seen claimant in 1995 in connection with the original claim. Dr. Koprivica first agrees that claimant needs further treatment. He recommends, however, that claimant attempt a swimming or water aerobic exercise program before considering surgery. Dr. Koprivica attributes the need for treatment to claimant's activities in his current work, not his injury with respondent:

His progression of symptoms is a direct result of cumulative injury that has occurred from his ongoing bending, twisting and lifting. In my opinion, the necessity for further treatment relates to his ongoing employment activities as he has described as opposed to being a direct result of the original injury of September 22, 1993.

Faced with these conflicting medical opinions, the ALJ appointed Dr. Glenn M. Amundson to perform an independent medical examination and to give opinions on the need for treatment and the cause of claimant's current problems. As to the cause, Dr. Amundson states:

Based on my evaluation of Mr. Jones, he presents with a history of permanent aggravating injury to his low back as a result of the accident of 9-22-93, arising out of his employment. . . . It appears this injury initiated and has resulted in progressive worsening of symptoms and tolerance of activities of daily living, recreational and occupational activities.

On the question of further medical treatment, Dr. Amundson states claimant is a surgical candidate at this point. He goes on to rate claimant's impairment and then states:

However, I feel that patient is not at maximum medical improvement. The patient has progressively and steadily deteriorated since his original on-the-job accident of 9-22-93. I think the patient is suffering both back and leg pain and subsequent debility warranting strong consideration of surgical intervention. Surgical intervention would best be addressed by an anterior and posterior instrumented fusion. This would be expected to give the patient significant relief and return of functional abilities.

Based on the medical opinions introduced as well as claimant's testimony, the Board concludes claimant needs further medical treatment, including possibly surgery, and that the need is a direct and natural consequence of the September 1993 accident. Respondent points first to a factual finding made by the ALJ at the time of the original award. The ALJ found that if claimant needed surgery it was from an instability in claimant's low back that preexisted the September 1993 accident. According to respondent, the Board's decision to award future medical treatment does not alter this factual finding by the ALJ. The Board considers its Order, made as part of a trial de novo, to replace the decision by the ALJ. The Board did not adopt the finding respondent references and that finding, therefore, ceased to be of any effect. The Board held, instead, that claimant would be entitled to future medical expenses on application to and approval by the Director.

The evidence introduced does, in our opinion, establish that claimant's current need for treatment is a direct and natural result of the original injury. As a part of this conclusion, the Board finds that the work at U.S. Engineering was light work within claimant's restrictions and did not constitute an intervening injury. Claimant provides convincing testimony on this point. The Board agrees that surgery is appropriate as recommended by Dr. Healy, who is authorized as the treating physician, and agreed to by claimant. Unlike the ALJ, the Board construes Dr. Amundson's opinions to be firmly in support of surgery. Dr. Koprivica acknowledges the possibility that surgery may be necessary.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing order entered by Administrative Law Judge Robert H. Foerschler on August 30, 2000, should be, and the same is hereby, reversed. Respondent is ordered to provide medical treatment, including surgery, with Dr. Healy as the authorized treating physician.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Keith L. Mark, Mission, KS  
Gary R. Terrill, Overland Park, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director